DOCUMENT RESUME

ED 310 466 CS 506-803

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TITLE The Federal Communications Commission and Broadcast Indecency.
PUB DATE Apr 89
NOTE 52p.; Paper presented at the Annual Meeting of the Association for Education in Journalism and Mass Communication (72nd, Washington, DC, August 10-13, 1989).
PUB TYPE Speeches/Conference Papers (150) -- Historical Materials (060) -- Information Analyses (070)

EDRS PRICE MF01/PC03 Plus Postage.
DESCRIPTORS Audience Response; Censorship; Court Litigation; Federal Government; *Federal Regulation; Language Usage; Media Research; *Obscenity; *Programing (Broadcast); Standards
IDENTIFIERS *Federal Communications Commission; *First Amendment

ABSTRACT

This paper examines the government's authority to regulate indecent broadcasts, beginning with a historical overview of the Federal Communication Commission's (FCC) involvement with broadcast indecency and its application in case law. First Amendment considerations are discussed and some suggestions are made regarding how the Commission should approach the issue of broadcast indecency. The paper argues that since the Federal Communications Commission's expansion of its enforcement standards against indecent broadcast programming in 1987, the extent to which indecent speech may be regulated consistent with the First Amendment remains unsettled and controversial. (One hundred thirty-seven notes are included.) (Author/RS)

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The Federal Communications Commission and Broadcast Indecency

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ABSTRACT

In 1987 the Federal Communications Commission expanded its enforcement standards against indecent broadcast programming. But the extent to which indecent speech may be regulated consistent with the First Amendment remains unsettled and controversial. This paper examines the government's authority to regulate indecent broadcasts, beginning with a historical overview of the FCC's involvement with broadcast indecency and its application in case law. First Amendment considerations are discussed and some suggestions are made regarding how the Commission should approach the issue of broadcast indecency.

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Presented to the Law Division of the Association for Education in Journalism and Mass Communication, April 1989

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A scantily-clad woman attempts to entice a politician into sadomasochistic bondage; a TV talk-show guest discusses having sexual relations with a dog; a radio talk-show host repeatedly tells callers they are "douche bags" and uses offensive expletives.[1] Programming standards are changing.

The traditional consensus about what constitutes acceptable broadcast content appears to be quickly eroding. Lurid, sleazy, sensational and titillating--"trash TV" and "shock radio" are exploding across the broadcast dial.[2]

One reason for these programming changes is the increasingly competitive marketplace in electronic communication. In many television markets, cable, home video and an increase in the number of competing stations has sent audience shares skidding.[3] The radio marketplace is also increasingly competitive, marked by a large jump in the number of stations.[4]

The liberalization of content standards has created some ratings successes; large segments of the available audience willingly devour sensational fare. But there has also been fallout. Public complaints about inappropriate broadcast material have increased advertisers' sensitivity toward program content. Some advertisers are responding by withdrawing their sponsorship, and threats of public boycotts are heard.[5]

The Federal Communications Commission (FCC) has also responded, warning broadcasters in the spring of 1987 that it was expanding its enforcement standards regarding indecent broadcast programming.[6] And in 1988, the U.S. Congress passed a law banning the airing of "indecent" programming at any time during the broadcast day.[7]

These actions have sparked renewed debate over the proper balance to be struck between the rights of broadcasters and the adult public to program and receive indecent content, and the government's right to restrict such fare in order to protect children from exposure to broadcast material that most parents regard as inappropriate. While concern for the child audience is legitimate, there is also evidence that the FCC's expanded enforcement standards have resulted in broadcaster self-censorship, chilling the exercise of First Amendment rights. For example, in February 1989, noncommercial radio station KPFA, licensed to Pacifica Radio, felt compelled to omit certain words and phrases from its reading of Salman Rushdie's novel, The Satanic Verses for fear of FCC retribution.[8]

Broadcasters have always been subject to a variety of content controls, despite a long-standing statutory prohibition against government censorship of radio communications.[9] One such content control, the broadcast of obscene, indecent or profane material, is prohibited by section 1464 of the U.S. Criminal Code.[10] The Communications Act of 1934 authorizes the FCC to enforce this criminal statute and grants it significant administrative power to impose sanctions.[11] While there is no question of the government's power to legally ban the broadcast

of obscene speech, the extent to which indecent speech may be regulated consistent with the First Amendment remains unsettled and controversial.[12]

This paper examines the government's authority to ban indecent broadcasts. It begins with an historical overview of the FCC's evolving standards for determining broadcast indecency and its application in case law. This is followed by a review of the FCC's recent expansion in the scope of its enforcement policy against broadcast indecency and the law banning all indecent broadcasts. First Amendment considerations are discussed and some suggestions are made regarding how the Commission should approach the issue of broadcast indecency.

Early Cases

Until 1970, the Commission did not directly apply the statutory ban against broadcast indecency in cases where offensive program content was a factor, preferring instead to impose sanctions based on its statutory power to regulate broadcasting in the public interest.[13] For example, in a 1931 decision denying license renewal to station KGEF-Trinity Methodist Church, the Federal Radio Commission held among other things that the licensee, Reverend Dr. Schuler, had aired broadcasts which were "sensational" rather than instructive. In upholding the denial of renewal, the D.C. Circuit of the U.S. Court of Appeals held that it was neither censorship nor previous restraint to deny a license to those who "obstruct the administration of justice, offend the religious susceptibilities of thousands, inspire political distrust and civic discord, or

offend youth and innocence by the free use of words suggestive of sexual immorality,. . ."[14] [Emphasis added].

The Commission has also considered offensive broadcast content in the context of the character criterion used in initial licensing decisions. In 1949 the FCC denied an operating permit and a construction permit to an applicant for stations in Knoxville, Tennessee, based on misrepresentation of stock distributions and past program content. On appeal, the D.C. Circuit Court agreed with the Commission that the applicant lacked the necessary character qualifications to become a licensee, in part because the applicant "had used intemperate language in his writings, sermons and broadcasts; that he had a constant habit of attacking the honesty and sincerity of those individuals and groups who did not agree with him; . . . that he was an expert in vituperation and vilification."[15]

The broadcasting scandals in the late 1950's provoked the Commission into a broad review of its general programming standards. In an extensive reexamination of its statutory authority, the Commission in its 1960 En Banc Programming Inquiry Report emphasized the statutory ban against the broadcast of obscene, indecent and profane language as an exception to the no censorship clause of the Communications Act and general First Amendment strictures.[16] The Commission asserted that because broadcast signals enter directly into the home and are available to children and the emotionally immature, the broadcasting medium presented peculiar problems requiring rules not governing other media. ". . . [W]hile a nudist magazine may be within the protection of the First Amendment . . . the televising of nudes

might well raise a serious question of programming contrary to 18 U.S.C. 1464."[17]

In the early 1960s the Commission began to increase its oversight of programming containing sexual content.[18] Almost simultaneous with the issuance of its En Banc Programming Inquiry, the Commission initiated an investigation of station WDKD-Palmetto Broadcasting, the only station in Kingstree, South Carolina. The Commission was responding to complaints alleging that the station's "Charlie Walker" program was vulgar, suggestive, and susceptible of double meanings with indecent connotations. The Commission refused to renew the license based on the owner's misrepresentation that he was unaware of the program's content or the complaints.[19] Because the decision was based on misrepresentation, the FCC chose to side-step the issue of whether the programming violated the statute against airing indecent material. But it did affirm its obligation to consider non-obscene but nevertheless objectionable programming at license renewal time under the statutory public interest standard. If limited only to examining allegedly obscene material, the Commission feared ". . . it would be powerless to prevent this perversion or misuse of a valuable resource. The housewife, the teen-ager, the young child--all would simply be subjected to the great possibility of hearing such patently offensive programming whenever they turn the dial."[20] While disavowing any authority to set itself up as a national arbiter of taste, it nonetheless concluded that the broadcasts were patently offensive. The decision was upheld by the D.C. Circuit Court of Appeals on

grounds of misrepresentation, but it did not decide whether the material violated the indecency statute, and if so, whether the statute could pass constitutional muster.[21]

The FCC has on occasion been hesitant to impose sanctions simply because programming was offensive to some listeners, as was the case in the 1964 license renewal decision in Pacifica Foundation (Pacifica I).[22] The case involved public complaints about five programs which had aired on Pacifica's station KPFK-FM over a four-year period. Pacifica defended three of the programs and admitted that passages from the other two programs failed to meet its standards of good taste. The FCC refused to act on the complaints, noting that the licensee was given great discretion under the Communications Act and that the programs ran after 10 p.m. when the number of children in the audience was at a minimum. Regarding the two programs which may have been inconsistent with the public interest standard, the Commission said that "[t]he standard of public interest is not so rigid that an honest mistake or error on the part of a licensee results in drastic action against him where his overall record demonstrates a reasonable effort to serve the needs and interests of his community."[23] Finding no evidence of a pattern of programming outside the public interest, the Commission renewed the station's license.

The first case in which the Commission found a statutory violation of the section 1464 indecency ban involved Philadelphia station WUHY, licensed to Eastern Education Radio.[24] In early 1970, the small noncommercial station broadcast a taped interview with Grateful Dead musician Jerry Garcia. In the

interview, which aired between 10 p.m. and 11 p.m., Garcia expressed his views on a variety of contemporary matters, frequently interspersing grammatical variations of the words fuck and shit. While the Commission had received no public complaints about this particular interview, it had received several complaints about the station's programming during the time slot and had been monitoring the broadcast.

The FCC claimed authority to review the station's programming based on its statutory obligation to license in the public interest and its jurisdiction to enforce section 1464. The Commission held that the use of the "gratuitous" expletives violated the criminal code and fined the station $100.[25] The station paid the fine without seeking judicial review.

The Commission used the Garcia case to erect its standard for judging section 1464 indecency. Selecting planks from the Supreme Court's then-current test for obscenity,[26] the FCC held that indecent broadcasts were those which were 1) patently offensive by contemporary community standards; and 2) utterly without redeeming social value.[27]

The FCC's indecency test offered significantly less protection for indecent speech than the Supreme Court's test for obscenity. Under the indecency test, material need not be shown to appeal to a prurient interest before it can be banned, nor is there a requirement to examine the material from the perspective of the average person or to consider the dominant theme of the work as a whole. The Commission justified this diminution in protection by recognizing broadcasting as a mode of communication

having special qualities which distinguish it from other media: it comes directly into the home, frequently without advance warning; stations are sampled across the dial; and thousands of people not within the intended audience for a program may see or hear portions of the broadcast, including a large number of children.[28]

In drawing its finding of indecency, the FCC concluded that the language had no redeeming social value and was patently offensive by contemporary community standards. Two Commissioners dissented from the result, suggesting that the standard was unconstitutionally vague and overbroad.[29] The Commission's Notice, however, warned of dire social consequences if such programs were left unchecked:

> Were this type of programming . . . to become widespread, it would drastically affect the use of radio by millions of people. No one could ever know, in home or car listening, when he or his children would encounter what he would regard as the most vile expressions serving no purpose but to shock, to pander to sensationalism. Very substantial numbers would either curtail using radio or would restrict their use to but a few channels or frequencies, abandoning the present practice of turning the dial to find some appealing program. 30

The FCC's next encounter with sexually provocative programming came in 1973, in the midst of growing public complaints and Congressional pressure to check the proliferation of radio talk shows discussing sexual relations.[31] The Commission responded aggressively, launching on March 27, 1973 a Notice of Inquiry into the Broadcast of Obscene, Indecent or Profane Material.[32] The purpose of the non-public inquiry was to determine if certain broadcast and cable licensees had violated section 1464 of the criminal code. Significant pressure was also

placed on the broadcast industry through its major trade association to eliminate sexually-oriented programming.[33] The impact of the closed Inquiry and the "raised eyebrow" warnings led to an almost total absence of discussion of sexual topics on radio.

Six days prior to adopting the Notice the Commission had listened to a 22-minute audio tape of excerpts from certain radio call-in programs prepared by the FCC staff. On April 11, 1973 it issued a Notice of Apparent Liability against Sonderling Broadcasting Corporation for violations of section 1464.[34] The Notice cited two programs aired on WGLD, Sonderling's station in Oak Park, Illinois. The programs, part of the station's daytime call-in show "Femme Forum," contained repeated and explicit descriptions of the techniques of oral sex.[35] The Commission found that these discussions were not presented for educational or scientific purposes but in a titillating and pandering manner, including a discussion of non-nutritional uses for peanut butter, whipped cream and marshmallows. Concluding that the programs contained both obscene and indecent matter, the Commission assessed a $2,000 forfeiture. Sonderling, denying liability but fearing the expense of litigation, paid the fine.

The Illinois Citizens Committee for Broadcasting (ICCB), a citizens group, filed a Petition for Reconsideration, asking the FCC for a remission of the forfeiture and termination of the Inquiry.[36] The FCC refused and the citizens group filed for judicial review at the D.C. Circuit Court of Appeals. The ICCB argued they were being deprived of listening alternatives in

violation of their First Amendment rights.

The Circuit Court granted standing to members of the public in the obscenity determination, even though the broadcaster had acquiesced to the FCC's determination by paying the fine. However, it refused to give the public standing regarding the procedural aspects of forfeiture.

The court upheld the Commission's finding that the broadcasts were obscene.[37] It also said the Commission's consideration of the probable presence of children in the audience, and the contextual consideration of the announcer's "leering innuendo" were appropriately relevant to the determination of obscenity. Having found the work obscene, however, the court did not address the question of the constitutionality of the FCC's interpretation and application of the indecency charge.

The Court's 1978 Pacifica Decision

There has been only one decision by the U.S. Supreme Court interpreting the meaning of section 1464 broadcast indecency. In FCC v. Pacifica Foundation, (Pacifica II) the Court in a 5-4 decision, upheld the FCC's power to regulate a radio broadcast that was indecent but not obscene.[38]

The case stemmed from a complaint the Commission had received from a man, alleging that while driving his car accompanied by his young son, he had heard an offensive broadcast over station WBIA, a New York station licensed to the Pacifica Foundation. The December 1973 broadcast occurred about 2:00 p.m. on a weekday afternoon during a program characterized by the station as an analysis of contemporary society's attitudes toward

language. Within the live program, and after issuing a listener advisory about the possibly offensive nature of the material, a 12-minute recorded comedy monologue by satiric humorist George Carlin was played. The monologue featured the repeated use of seven words depicting sexual and excretory organs and activities.[39] The Commission and the station had received only this one complaint.

In response, the Commission issued a Declaratory Order in which it concluded that, as broadcast, the repeated use of such words at a time of day when children were in the audience was indecent under the statute.[40] The Commission decided to forego administrative sanction since the decision was used to clarify the applicable standards for indecency. It did, however, make the finding part of the station's license file, and warned of sanctions if subsequent complaints were received.

In light of the Supreme Court's new test for obscenity in Miller v. California,[41] the Commission used the Pacifica II decision to reformulate its definition of indecency:

> . . . language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience.42

The Commission distinguished indecency from obscenity for section 1464 purposes, noting that indecent material may lack prurient appeal and that the airing of indecent content would not be redeemed by a claim of serious literary, artistic, political or scientific value (SLAPS test) when children were in the audience. Based specifically on the need to protect children, the

Commission established a guideline of "variable indecency," stressing the importance of channeling away inappropriate content when there was a reasonable risk that children were in the audience.[43] In the late evening hours, the indecency definition would remain the same but the so-called SLAPS test would be applicable. The FCC emphasized the narrowness of the decision, stating that the "number of words which fell within the definition of indecent was clearly limited."[44]

Pointing to the intrusive nature of broadcasting, the Commission gave four reasons for the need to exercise its authority against indecency: (1) children often have unsupervised access to radio; (2) personal privacy interests are entitled to greater deference in the home; (3) unconsenting adults may be exposed to indecent programming without warning; and (4) the government had important public interest responsibilities because of spectrum scarcity.[45] The Commission asserted that the language used in the Carlin monologue had the effect of "debasing and brutalizing human beings by reducing them to their mere bodily functions"[46] and that the widespread use of indecent language would lead to significant harm, including the "critical impairment of broadcasting as an effective mode of expression..."[47]

Pacifica appealed to the District of Columbia circuit of the United States Court of Appeals. By a 2-1 vote the appeals court held that the FCC's action impermissibly interfered with licensees' discretion in programming and therefore violated the no censorship clause of the Communications Act.[48] While the

court did not rule on whether the standards for judging indecency could ever be different than those for determining obscenity, it did find the FCC's Declaratory Order as applied to Pacifica was unconstitutionally vague and overbroad.

The court found the Declaratory Order unconstitutionally vague because it failed to define which children the Commission was seeking to protect. In its overbreadth analysis the court concluded that the channeling solution was overbroad since children are in the audience throughout most of the broadcast day, producing substantially the same effect as an absolute ban. ". . . the Order sweepingly forbids any broadcast of the seven words irrespective of context or however innocent or educational they may be. . . . Clearly every use of these seven words cannot be deemed offensive even as to minors."[49] The court pointed out that daytime-only stations could not air indecent material at all, and that the material would be unavailable to potential listeners unless they were willing to forego sleep.

The appeals court also rejected the FCC's position that the unsuspecting dial scanner is entitled to an increased privacy interest simply because the decision to use the radio may occur in the home where privacy concerns are enhanced. According to the court, "[p]rivacy expectations, even in the home, diminish when listeners choose to gain access to a public medium."[50] The court also criticized the FCC for offering no empirical evidence for its assumption that without action filth would flood the airwaves and for failure to consider the impact of economic market forces to keep such programming in check.[51]

The U.S. Supreme Court reversed the decision. Justice

Stevens, writing for the 5-4 majority, rejected the argument that the no censorship clause limited the Commission's authority to impose section 1464 sanctions.[52] Noting that both of the relevant statutes were originally found in the Communications Act, the Court concluded that Congress must have intended to give meaning to both provisions, thus making the no-censorship clause ". . . inapplicable to the prohibition on broadcasting obscene, indecent, or profane language."[53] As to whether the section 1464 prohibition must be determined only on the basis of obscenity as defined by the Miller test, the Court held that the plain language of the statute, written in the disjunctive, implied that each of the words--obscene, indecent and profane--had a separate meaning.[54] In fact, the Court did not even directly examine the Commission's definition of indecency, stating that the normal definition of indecent "merely refers to nonconformance with accepted standards of morality."[55] The Court concluded that the element of prurient appeal, necessary for a successful obscenity prosecution, did not apply to broadcast indecency.[56]

The Court chose to avoid Pacifica's claim of facial overbreadth. Despite the general nature of the statements made in the FCC's Declaratory Order, the Court relied on the fact that the FCC's action did not constitute a formal rulemaking or promulgation of regulations to limit its overbreadth review to the proscription of the Carlin monologue as broadcast. It found no overbreadth infirmity with the FCC's finding of indecency in this context. Regarding the potential chill on protected expression, a divided plurality held that the most harm

enforcement of the indecency statute would have would be the deterring of patently offensive broadcast materials that "surely lie at the periphery of First Amendment concerns."[57]

The Court reaffirmed its view of broadcasting as having more limited First Amendment protection than that given to other media because of its the uniquely pervasive presence and its general accessibility to children.[58] While acknowledging that adults have a right of access to non-obscene material, the Court noted the inherent inability to partition children out of the broadcast audience. In addition, the Court said that the greater privacy interests long recognized as accruing in the privacy of an individual's home should not be undermined simply because broadcast messages come directly into the home at the flip of a switch. The privacy rights of the individual in his home outweigh the First Amendment rights "of an intruder."[59] The Court also held that prior warnings and the ability to change the channel or turn off the receiver were insufficient remedies: "[t]o say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow."[60] Following its holding in Ginsberg v. New York, the Court concluded that "the government's 'interest in the well-being of its youth' and in supporting 'parents' claim to authority in their own household' justified the regulation of otherwise protected expression.'"[61]

In conclusion, the Court emphasized the extreme narrowness of its holding, noting that it had not decided whether the broadcast of Carlin's monologue would support a criminal

prosecution.[62] They simply endorsed the Commission's contextually-based nuisance rationale where time of day, the program in which the language was used and audience composition were all important factors.[63]

Justice Stewart, writing for the four Justices in dissent, argued that the word indecent in section 1464 should be construed to prohibit only obscene speech, thereby allowing the Court to bypass the constitutional issue of whether the Commission had statutory power to ban indecent speech.[64] Justice Brennan, in a dissenting opinion joined by Justice Marshall, asserted that the Court had misconceived the nature of the privacy interests involved, overestimating the interest of an individual voluntarily choosing to admit radio communications into his home and underestimating the interests of the broadcaster and those who desire to receive the broadcasts.[65] In Brennan's view, the ability to turn to another station or turn the set off precluded any intolerable invasion of privacy.

Regarding the adoption of a variable indecency standard, Brennan pointed out that the similar societal interest in adopting a variable obscenity standard in Ginsberg was based on the prurient appeal of material available to children which was assessed in terms of the sexual interests of minors. Brennan felt the same standard should not apply to Carlin's speech, where prurient interest was not involved.[66]

The 1987 Cases

Following the Supreme Court's decision in Pacifica II, the Commission's approach to indecency was thought to be generally

limited to the deliberate, repetitive use of the seven words found objectionable in the George Carlin monologue when aired before 10:00 p.m. The assumption was "unstated, but widely assumed, and implemented for the most part through staff rulings, . . ."[67] In essence, the Commission had created a "safe harbor" for airing indecent speech between the hours of 10:00 p.m. and 6:00 a.m. because children were not reasonably expected to be in the audience during this time. For the nine years following its Pacifica II decision, the Commission had taken no action against any broadcast licensee for violating the prohibition against indecent broadcasts.

The narrow interpretation of broadcast indecency ended in April 1987, when in deciding three indecency cases, the Commission signaled a significant expansion of its section 1464 enforcement policy.[68] While not issued as a formal Rulemaking or Order, the decisions were clearly intended to serve as a general notification to all broadcasters that the Commission had significantly increased the scope of its enforcement.[69] In each of the three cases the Commission concluded that indecent programming had been aired, but limited its sanctions to a warning because of its changed policy.[70]

The first decision involved complaints about two programs which had run on KPFK-Los Angeles, once again a station licensed to the Pacifica Foundation (Pacifica III). The first program which drew a complaint was entitled "Shocktime America" which had run at 7:45 p.m. and allegedly contained a narration and song lyrics utilizing words and phrases such as "eat shit," "mother-fucker" and "fuck the U.S.A." Responding to the Commission's

inquiry, Pacifica indicated that the live program had been produced by a performance art group and that the remarks had been unscripted. It acknowledged that listeners might well have found the program offensive and expressed regret for the incident. It noted that the program did not meet the station's standards for good taste and that it had removed the program from the air.

The second complaint against Pacifica involved a program aired on a Sunday evening from 10:00 p.m. to 11:00 p.m. The program, titled "I Am Are You?" (IMRU) featured excerpts from a play involving dramatic readings of sexual fantasies which contained language highly descriptive of sexual and excretory activities.[71] In response, Pacifica explained that the program was directed to the area's gay population and that the excerpts were from a critically acclaimed play dealing with AIDS. It argued that the Commission's complaint provided no consideration of the context in which the words and phrases were broadcast. In addition, Pacifica noted that there had been a warning issued preceding the broadcast, and that it believed children would not ordinarily be in the listening audience.

In response, the FCC articulated its new position toward determining indecency. It abandoned the argument of spectrum scarcity as sufficient grounds for its jurisdiction over indecent speech and rejected the notion of diminished First Amendment rights for broadcasters as a justification for more expansive restrictions compared to other media.[72] Citing the physical inseparability of adults from children in the broadcast audience, the Commission concluded that its channeling requirement was

simply a reasonable time, place and manner distinction consistent with the same First Amendment protections afforded the print media.[73]

The Commission next warned broadcasters that it was no longer permissible to air indecent broadcasts after 10:00 p.m., even when they were preceded by a warning. Regarding the expansion of content which the FCC would now consider indecent, it stated:

> . . . [W]e take this opportunity to state that, notwithstanding any prior contrary indications, we will not apply the Pacifica standard so narrowly in the future.
>
> . . . If a complaint focuses solely on the use of expletives, we believe that under the legal standards set forth in Pacifica, deliberate and repetitive use in a patently offensive manner is a requisite to a finding of indecency. When a complaint goes beyond the use of expletives, however, repetition of specific words or phrases is not necessarily an element critical to a determination of indecency. 74

In resolving the first complaint against Pacifica, the Commission found itself unable to determine whether the specific "Shocktime, U.S.A." broadcast violated section 1464.[75] Because there was no information beyond the fact that four phrases were uttered, the Commission said it could not determine precisely the context or whether the use of patently offensive speech was isolated.[76] It went on to say that even if it could have determined that the broadcast had been indecent, it would have declined to take action because it occurred during a live, spontaneous and unscripted performance and the station had taken remedial action against the group that produced the program.[77] In its view, the licensee had exercised reasonable judgment, responsibility and sensitivity to the public's needs and tastes.

Regarding the IMRU program, the FCC held that there was extensive use of patently offensive language that fell within its new indecency parameters.[78] Citing an Arbitron audience report, the FCC rejected Pacifica's claim that there was little risk that children were in the audience.[79] While issuing only a warning for airing indecent programming, the Commission found a sufficient possibility that the program met the Miller test for obscenity. It forwarded a tape to the Department of Justice to consider criminal prosecution.[80]

The second case decided the same day involved a broadcast by Santa Barbara student station KCSB, licensed to the Regents of the University of California. This case dealt with the lyrics of a recorded song titled "Makin' Bacon," which aired without warning shortly after 10:00 p.m. on a Saturday evening.[81] After examining the lyrics, the Commission held that even though the material did not contain the words used in the Carlin monologue, they were nevertheless indecent under section 1464. Turning again to Arbitron reports, the Commission found that there was a reasonable risk that children may have been in the audience after 10:00 p.m.[82] Because of the prospective nature of its review, the Commission again declined to issue any sanction.

The third case in the April trilogy involved the morning drive-time broadcasts of station WYSP announcer Howard Stern. The Commission had received three complaints against the program which originated in New York and was simulcast in Philadelphia by WYSP, a station licensed to Infinity Broadcasting. The complaints objected to various comments of a sexual nature

broadcast by Stern, often in the form of the double entendre and sexual innuendo.[83] Responding to the complaint, Infinity argued that the show contained none of the patently offensive expletives used in Pacifica II and pointed to the popularity of the program.

In holding the broadcasts indecent, the FCC stressed that the classification of indecency could not turn on the mechanistic classification of language (such as a double entendre and innuendo) but must be examined in context because words that in one context may be innuendo or double entendre, "may be rendered explicit in other contexts when they are intermingled with explicit references that make the meaning of the entire discussion clear or capable only of one meaning."[84] Upon examining Stern's remarks in such context, the Commission concluded that some of the references were patently offensive and that their sexual and excretory import was clear. In addition, the programming had aired during the day, when children were expected to be in the audience. This station was also let off with a warning.

The Reconsideration Order

In response to numerous petitions, the Commission in November 1987 issued a Memorandum Opinion and Order clarifying its new position on broadcast indecency.[85] Stating that it recognized indecent but non-obscene programming as constitutionally protected speech, the Commission emphasized that its new policy was not intended to preclude adult access but was simply an accommodation of competing interests. Without explanation, it announced that 12:00 midnight was now its "current thinking" of when it would be safe to begin airing

indecent material.[86]

The Commission rejected the claim that the need for case-by-case contextual examination rendered the phrase "patently offensive" unconstitutionally vague, noting that the term is applied in obscenity cases.[87] It identified a host of variables, whose interplay would depend on the facts presented, which would be considered in making determinations of indecency: (1) the actual words or depictions in context to see if they are vulgar or shocking; (2) the manner in which the language or depictions are portrayed; (3) whether the material is isolated or fleeting; (4) the ability of the medium to separate adults from children; and, (5) a determination of the presence of children in the audience.[88] The Commission refused to give its future rulings only prospective effect, stating that such a policy would undermine meaningful enforcement. It noted that while serious program merit was one element to be taken into consideration, merit alone would not immunize programming from an indecency determination. Finally, the Commission stated that even though it would not defer to the reasonable, good faith judgment of the licensee, it would take such judgment into consideration when deciding on the harshness of any sanctions. The FCC's decision was appealed to the D.C. Circuit Court of Appeals.

In July 1988 the appeals court decided Action for Children's Television v. FCC.[89] In a unanimous decision, the court upheld the Commission's definition of indecent broadcast material but held that the Commission had not adequately justified its more restrictive, midnight channeling approach.[90]

It also rejected the FCC's analysis that its indecency policy was simply time, place and manner regulation, noting that the enforcement policy was not content neutral.[91] It remanded the Pacifica III and Regents of U.C. cases back to the Commission for redetermination with instructions to hold a full hearing regarding the times at which indecent material may be broadcast.

The 24-Hour Ban

In June 1989, the U.S. Supreme Court decided the case of Sable Communications v. FCC.[92] Petitioners in the case had challenged a 1988 amendment to the Communications Act which imposed a 24-hour ban on indecent as well as obscene interstate commercial ("dial-a-porn") telephone messages. The Court upheld the ban against obscene telephone messages but found that the ban on indecent messages violated the First Amendment because it far exceeded what was necessary to serve the compelling interest of preventing minors from being exposed to the messages.[93] While acknowledging that sexual expression which is indecent but not obscene is protected by the First Amendment, the Court declined to distinguish obscenity from indecency.[94]

The Court rebuffed the government's attempt to rely on the Pacifica II decision to justify the total ban on indecent telephone communication. In distinguishing the Pacifica II decision, the Court again relied on what it felt were the unique attributes of broadcasting: pervasiveness, intrusion without warning into the privacy of the home and accessibility to children, even those too young to read.[95] The Court also restated the notion of verbal assault by broadcast: "Placing a telephone call is not the same as turning on a radio and being

taken by surprise by an indecent message. Unlike an unexpected outburst on a radio broadcast, the message received by one who places a call . . . is not so invasive or surprising that it prevents an unwilling listener from avoiding exposure to it."[96]

Portions of the Court's decision in Sable suggests that the current 24-hour ban on indecent broadcasts will not withstand First Amendment scrutiny. The Sable decision specifically recalled the emphasized narrowness of the Court's Pacifica II decision and noted that the issue of a total ban was not before the Court in that case.[97] In addition, the Court refused to defer to Congress' conclusion that the round-the-clock ban on telephone messages was needed to protect minors: "[d]eference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake."[98] Taken together, statements made by the Court in Sable would indicate that the government's ban on all indecent broadcasts violates the First Amendment.[99]

Vagueness Analysis

As presently applied, the Commission's indecency regulation is unconstitutionally vague and overbroad. The content-based regulation is not a narrowly-tailored, least-restrictive means of meeting a compelling state interest. In addition, the Court's continued reliance on an enhanced privacy interest in the home, in the broadcast context, is misguided.

The FCC's current indecency standard is unconstitutionally vague because it gives broadcasters no meaningful guide identifying the type of subject matter to be regulated, which children need to be protected or when there is a "reasonable

risk" that such children are in the broadcast audience. While it appears to be settled law that section 1464 "indecency" is legally distinguishable from "obscenity," the FCC's definition of "indecent" remains so vague that "persons of common intelligence must necessarily guess at its meaning and differ as to its application."[100]

First, the indecency definition fails to define what is meant by patently offensive speech. The appeals court in ACT v. FCC refused to address this issue, holding that because the U.S. Supreme Court upheld the definition in Pacifica II, it must have also "implicitly" held the definition was capable of surviving a vagueness challenge.[101] But the Court's decision in Pacifica II was narrowly limited to a specific factual situation involving seven dirty words. The new indecency policy is significantly broader, and the factors which the Commission has identified as relevant to judging patent offensiveness give little insight into how an ultimate determination is to be made.[102] While the term patently offensive may be somewhat inherently vague, its acceptance in obscenity law, where the accused enjoys the full protections of the entire Miller test, does not automatically qualify the term to survive a vagueness challenge when applied to indecent speech which is protected by the First Amendment. There are very few cases to guide broadcasters. Indeed, patent offensiveness is a majoritarian term but the right to broadcast non-obscene but sexually offensive material is assured through the First Amendment's protection of minority rights. As the Court has stated: "[s]peech cannot be stifled by the government merely because it would draw an adverse reaction from the

majority of the people."[103]

Second, the indecency definition is vague because it fails to define which children are in need of protection. The Commission has never addressed the question of when young children become capable of being harmed by indecent but non-obscene material. It seems unlikely that all minors are harmed by indecent material regardless of age. Very young children, lacking the cognitive ability to interpret broadcast content, may not be harmed at all. And parents of older teens may have no concerns about protecting them from sexually-oriented, non-obscene material; many teens routinely encounter such fare in day-to-day living.

Third, the definition is vague because there is no clear definition of what constitutes a "reasonable risk" that children are in the audience. In the April 1987 decisions, the Commission held that stations had violated a criminal statute based only on the number of teenagers, age 12-17, in the overall radio audience. For example, in the Pacifica III case the Commission rejected Pacifica's contention that it didn't believe children were in the audience by citing the fact that during an average quarter hour, 112,200 teenagers, age 12-17, were estimated to be in the radio market between the hours of 7:00 p.m. and midnight[104] (emphasis added). By the time the IMRU program began at 10:00 p.m., a significant percentage of this teenage audience had likely gone to bed. In assessing what is a reasonable risk that children are present in the audience, it seems illogical to assume that with over 50 radio signals available in the Los

Angeles market, a significant number of the estimated 112,200 teenagers were turned into the avant-garde Pacifica station. But even granting that assumption, the Commission has never articulated how many children have to be in the audience before the constitutionally protected rights of adult listeners to receive non-obscene material can be curtailed. While the creation of a safe-harbor period resolves the problem of using audience report data gathered from surveys by commercial services, the FCC's announcement of midnight to 6:00 a.m. as its "current thinking" on a safe-harbor period was arbitrary and unreasonably limited adult access.

A clear understanding of what constitutes indecent material is a necessary antecedent to defining the reasonableness of any safe-harbor period. There are always a few children in the audience.[105] As Justice Scalia stated in the dial-a-porn case:

> . . . [A] wholesale prohibition upon adult access to indecent speech cannot be adopted merely because the FCC's alternative proposal could be circumvented by as few children as the evidence suggests. But where a reasonable person draws the line in this balancing process--that is, how few children render the risk unacceptable--depends in part upon what mere 'indecency' (as opposed to 'obscenity') includes (emphasis added). The more narrow the understanding of what is 'obscene,' and hence the more pornographic what is embraced within the residual category of 'indecency,' the more reasonable it becomes to insist upon greater assurance of insulation from minors.[106]

Overbreadth Analysis

The FCC's indecency definition is so vague as to be necessarily overbroad. The definition clearly has the potential to limit both speech which may be constitutionally proscribed and speech which is protected.[107] Broadcast licensees are very

conservative when it comes to protecting their licenses. The violation of a criminal law could hurt an existing licensee's chances of renewal and could become a determinative factor in a comparative licensing situation.

Only two Justices in Pacifica II chose to address the overbreadth issue, concluding that the argument should fail because of the Commission's intention to proceed cautiously and the fact that they foresaw no undue chilling effects.[108] The appeals court in ACT v. FCC also rejected the overbreadth argument because the FCC now takes into consideration whether the allegedly indecent material has serious merit and the reasonableness of the licensee's action.[109] But the Commission has refused to discuss the weight which merit has in assessing a possible a violation of the criminal code. It would appear that many works of great classical and contemporary literature, including the Bible, could still be banned. The potential for chilling effects remains great.[110]

Admittedly, striking down a law as overbroad is strong medicine to be used sparingly.[111] But the FCC's indecency policy clearly fails to meet the requirement that content-based restrictions be carefully-tailored with "a precisely drawn means of serving a compelling interest."[112]

In the April 1987 Pacifica III decision, the FCC abandoned the spectrum scarcity argument as grounds for its jurisdiction over indecent speech and rejected the notion of diminished First Amendment rights for broadcasters as a justification for more expansive restrictions compared to other media.[113] Citing the physical inseparability of adults from children in the broadcast

audience, the Commission concluded that its channeling requirement was simply a reasonable time, place and manner distinction consistent with the same First Amendment protections afforded the print media.[114] This is not the case.

Judicial scrutiny of government restrictions on speech has traditionally been based on a two-category framework, depending on whether the regulation is content-based or content-neutral. Government regulation of speech based on content is subject to strict scrutiny and "may be sustained only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest."[115] This requires an analysis of whether the regulation is the least-restrictive alternative for meeting the compelling interest.[116] Time, place and manner regulation must be content-neutral and does not require examination of less-restrictive alternatives.[117]

While content-neutral regulations must be narrowly tailored to serve the government's legitimate content-neutral interests, the requirement is satisfied "so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation" and does not "regulate expression is such a manner that a substantial portion of the burden on speech does not serve to advance its goals."[118] While content-neutral regulations must allow for reasonable alternative avenues of communication, lower courts have been instructed to give government regulators deference to their regulatory approach since "the validity of content-neutral regulations 'does not turn on a judge's agreement with the responsible decision maker

concerning the most appropriate method for promoting significant government interests or the degree to which those interests should be promoted.'"[119] While a complete ban on indecent broadcasts may not withstand the less-demanding criteria of the content-neutral approach, courts would be hesitant to question the Commission's decisions regarding the appropriateness of safe-harbor times and other related policy decision concerning indecency.

The FCC cited two U.S. Supreme Court decisions as authority for its argument that channeling of indecent material was a content-neutral regulation. In Renton v. Playtime Theatres, Inc.[120] and Young v. American Mini-Theatres[121] the Court upheld zoning ordinances regulating the location of adult-movie theatres. The regulations were held to be content-neutral since they were not directed against the expressive content but rather to control the secondary effects of adult theatres, such as preservation of the quality of urban life and maintaining property values.[122]

The FCC's indecency standard, however, focuses on the direct impact of speech on its audience and is therefore not content-neutral.[123] Government regulation of indecent speech cannot be "justified without reference to the content of the regulated speech" and is therefore content based.[124] Indecency regulation is aimed directly at the words themselves and not on any supposed secondary effects.[125]

Given the content-based nature of broadcast indecency regulation, the FCC's present policy fails to persuasively articulate a compelling state interest. It has never relied on

empirical data to demonstrate any psychological harm resulting from children's exposure to non-obscene, indecent broadcast materials. Even assuming such evidence exists, the regulation would be terribly underinclusive given the harms social scientists have proven stem from exposure to violence-laden television fare. And there is certainly no proof that offensive programming has driven people to avoid the broadcast medium entirely or forced them to stop scanning across broadcast channels in order to protect themselves or their children. It has also never been proven that parents are somehow able to better control their children's access to indecent printed media than access to indecent broadcast programming.[126] Indeed, the broadcast marketplace itself, with its profit motive and reliance on advertisers subject to public pressure, should be able to limit the filth.

Even if one grants the argument that the Court has already accepted the premise that shielding children from indecent material is a compelling state interest, the FCC's indecency regulation does not meet the narrowly-tailored, least-restrictive means test. Unlike the Court's variable obscenity decision in Ginsberg v. New York,[127] the FCC's indecency policy unreasonably limits adult access. Certainly a 24-hour ban or the current midnight to 6:00 a.m. safe harbor has substantially the same effect an absolute ban. The Court's reliance in Pacifica II on such alternatives as purchasing a recording or attending a performance fails to properly consider the rights of persons unable to afford such alternative access. The FCC's present

indecency policy operates similar to the statute struck down by the Court in Butler v. Michigan since it ". . . reduces the adult population to . . . only what is fit for children. . . . Surely this is to burn the house to roast the pig."[128]

Privacy in the Home

The right to channel indecent broadcast material is based, in part, on the notion of an enhanced privacy right of a person in their home. There is no doubt that privacy interests are greater in the home where freedom from unwanted intrusions both by the government and others presenting unwanted materials are maximized.[129]

But the government's ability to shut off speech solely to protect others from hearing it is "dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner."[130] In both the Pacifica II and the Sable decisions, the Court has suggested that the shock from exposure to an indecent broadcast on the unsuspecting listener or viewer would constitute such an intolerable invasion of privacy. This view is misguided.

The Court supports its claim by relying on the case of Rowan v. Post Office Department.[131] In Rowan, the Court held that a person could prevent offensive mail from coming into their home by requiring a business to remove their name from a mailing list. But in Rowan it was the individual and not the government that was given the authority to stop the message from entering.[132] Indeed the holding could be viewed as analogous to changing a channel or turning off the broadcast receiver if a program is objectionable.

The fact that an adult viewer might be momentarily shocked and offended by a broadcast is not of sufficient import when balanced against the right to receive broadcasts of legally-protected speech. It is well established that when offensive, yet constitutionally-protected speech is encountered in public, the proper response is to avert one's eyes since the government may not censor protected expression.[133] People choosing to listen to or view broadcast programming are not a captive audience in the sense of a blaring sound truck or a public bus.[134] The radio can be turned off.[135] Expectations of privacy, even in the home, should diminish when listeners choose to access the public dialogue by turning on a broadcast receiver.[136]

Community Standards

Another problem with the Commission's indecency policy is the application of "contemporary community standards for the broadcast media." Obscenity determinations are generally thought to reference local community standards, since juries are selected based on state and federal court jurisdictions. Standards of indecency are also likely to vary substantially in different broadcast markets. The widespread popularity of the Howard Stern show would seem to indicate that it must have fallen within the acceptable standards of at least a significant number of persons in the localities where the program was available. Indeed it seems that what constitutes contemporary community standards for the broadcast medium has very little, if anything, to do with communities at all. The standards being applied are either those

of the individual commissioners or their interpretation of what they think are the values of the communities involved. While a Commission judgment against a licensee is eventually subject to judicial review, it is questionable whether (as currently staffed) two politically-appointed bureaucrats in Washington D.C. should, all alone, be able to draw conclusions about apparent violations of criminal law.

Conclusions

As it has done once before, the Commission should consider asking the Congress to get it out of the obscenity and indecency business.[137] Lacking that unlikely resolution, the Commission should change a number of its policies and procedures relating to its enforcement of alleged section 1464 indecency violations.

Most important is the need to clarify the type of subject matter which constitutes indecent broadcast material. This could be done by giving some general, yet contextually-based examples of what might or might not violate the statute. Such examples should also attempt to clarify the role of serious merit on indecency determinations. More precise guidance should also be given regarding the definition of patently offensive and its application in indecency policy. Such guidance would necessarily include a review of methods used to assess contemporary community standards for the broadcast media.

The Commission should also consult the available evidence concerning the nature of the alleged harms to children from exposure to indecent material and use this to determine which children are most in need of protection and when their viewing is

least likely to be subject to parental control. There may be different, identifiable categories of indecent material; repetition of certain profanities may cause no harm while more explicit descriptions might be significantly more damaging. The results of this inquiry can then be used in constructing a defensible safe-harbor policy which balances the access rights of adults with the legitimate concerns about the detrimental effect such fare may have on youth.

There are a number of alternatives the Commission should examine to reduce the potential chilling effects of its present indecency policy. This might include exempting news and informational programming from potential action and applying its indecency rulings prospectively.

Procedurally, the Commission should move against a broadcaster only after a clear pattern of complaints about allegedly indecent programming has been accumulated. Perhaps informal warnings could be used in egregious situations. But before a Notice of Apparent Liability is issued, the broadcaster should be required to respond to the complaints. Prompt judicial review, including standing for members of the public, should be available.

Perhaps most important, both the Commission and the broadcast industry should attempt to inform the public about the primary responsibility of parents to supervise their children's listening and viewing. Such a campaign should include messages identifying the need to accommodate competing interests and necessity of tolerance toward offensive speech.

Endnotes

1. All three descriptions are examples of broadcast programming which have recently drawn negative public comment. The first occurred in the NBC television mini-series "Favorite Son" which aired in November 1988. The second allegedly occurred in an episode of the "Oprah Winfrey Show." The third is a somewhat regular feature of an afternoon talk-show broadcast by station WIOD-AM in Miami, Florida. See, "Group Formed to Promote 'Responsible' TV," Broadcasting, (May 8 1989) :99; "Senate Tells Fifth Estate to Clean Up Its Act," Broadcasting, (June 5 1989) :27.

2. This shift in program content has not gone unnoticed in the popular press. For example, see Harry F. Waters et al., "Trash TV," Newsweek, cover story (November 14, 1988) :72.

3. Cable penetration has grown to approximately 53% of total U.S. television households with advertising revenues rising from $380 million in 1983 to $1.45 billion in 1988. Approximately 65% of all U.S. television households own a video cassette recorder with the typical household renting 4.5 movies per month. The three major commercial networks' share of the prime-time audience has fallen from 92% in 1978 to approximately 70% in 1988. The number of commercial television stations on the air has increased from 732 in 1979 to 1,060 in spring, 1989. See, Richard Zoglin et al., "The Big Boys' Blues," Time, cover story (October 17, 1988) :56.

4. There were 9,101 commercial radio stations on the air as of March 1989. The FCC has issued construction permits for an additional 918 radio stations. In 1979 there were 7,653 commercial stations on the air. In the last five years the Commission has also increased the authorized power and antenna heights for many stations, often leading to larger coverage areas. The FCC is also preparing to open up an additional 100 kilohertz on the AM spectrum.

5. Several large advertisers, including Procter & Gamble, Kimberly-Clark and McDonalds have stopped buying time on Fox Broadcasting's Married With Children. Chrysler Corporation and Sears, Roebuck & Company have decided to stop advertising on NBC's Nightingales. The Ralston Purina Company dropped plans for a $1 million ad buy on NBC's Saturday Night Live because it felt the show crossed over the line of good taste. General Mills also canceled ads on the show. In one recent skit on Saturday Night

Live actors tried to see how many times they could say "penis" on network tv. "Advertisers Leaving Nightingales, Saturday Night Live," The Miami Herald, 21 March 1989, sec. C, p. 6; "Michigan Viewer Urges Ad Boycott of 'Married...With Children,'" Broadcasting, (March 6 1989) :34.

6. FCC Public Notice, New Indecency Enforcement Standards to be Applied to All Broadcast and Amateur Radio Licensees, 2 F.C.C. Rcd 2726 (1987).

7. The 24-hour ban was signed into law on October 1, 1988. It was attached to the fiscal 1989 appropriations legislation for the departments of Commerce, Justice, and the Judiciary (Pub. L. 100-459, sec. 608, 102 Stat. 2186, 2228 (1988)). The law instructed the FCC to promulgate regulations for 24-hour enforcement of 18 U.S.C. 1464 (1982). The U.S. Court of Appeals for the District of Columbia Circuit has issued a stay against the total indecency ban (Action for Children's Television v. FCC, No. 88-1916 (D.C. Cir. 1989). See, "Review of Indecency Ban Sought by Media Organizations," News Notes, 15 MLR (BNA), 24 January 1989. On March 3, 1989, the appeals court refused an FCC request to delay making a judicial "summary disposition" regarding the ban until the Supreme Court decides a pending case involving the constitutionality of a new Congressionally mandated 24-hour ban on "indecency" in dial-a-porn telephone messages. See, National Association of Broadcasters, TV Today, 6 March 1989.

8. The New York Times, 27 March 1989, sec. Y, p. 5.

9. Section 326 of the Communications Act of 1934 provides:

> Nothing in this Act shall be understood or construed to give the Commission the power of censorship over radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication. 47 U.S.C. sec. 326 (1982).

Section 326 of the Act, in turn, was derived from Section 27 of the Radio Act of 1927, 44 Stat. 1162 (1927), repealed, 48 Stat. 1102 (1934). Content controls include bans on advertisements for cigarettes, illegal lotteries, and "fixed" contests. Program content is also examined in the comparative renewal context to assess the degree of legitimate renewal expectancy. RKO General, Inc. v. FCC, 670 F.2d 215, 237 (D.C. Cir. 1981), cert. denied, 456 U.S. 927 and 457 U.S. 1119 (1982).

10. 18 U.S.C. 1464 (1982). The section provides:

> Whoever utters any obscene, indecent, or profane language by means of radio communications shall be fined not more than $10,000 or imprisoned not more than two years, or both.

The statute originated as part of Section 326 of the Communications Act of 1934 and was shifted to the criminal code in 1948 as part of a comprehensive revision of the federal criminal law. The prohibition against indecent programming would seem to be a separate expression of Congressional intent.

11. The Commission has concurrent enforcement responsibilities with the Justice Department in matters arising under Section 1464. Enforcement of the statute by the FCC is more in the nature of a civil suit, since it would take Justice Department prosecution to lead to imposition of a jail term. Congress has specifically empowered the FCC to (1) revoke a station's license, (2) issue a cease and desist order, or (3) impose a monetary forfeiture for a violation of Section 1464, 47 U.S.C. 312(a)(6), 312(b), 503(b)(1)(E) (1982). The FCC can also (4) deny license renewal or (5) grant a short- term renewal, 47 U.S.C. 307, 308 (1982).

12. At least three current U.S. Supreme Court Justices (Brennan, Marshall and Stevens) feel that obscenity cannot be defined with the requisite specificity to avoid unconstitutional chilling effects. See Sable Communications of Calif. v. FCC, 57 U.S.L.W. 4920, 4925 (U.S. June 23, 1989) (Brennan, J. dissenting in part).

13. 47 U.S.C. 151 et seq. (1982). See Trinity Methodist Church, South, v. FRC, 62 F.2d 850 (D.C. Cir. 1932), cert. denied, 288 U.S. 599 (1933) (license renewal denied for sensational and offensive broadcasts); Independent Broadcasting Company v. FCC, 193 F.2d 900 (D.C. Cir. 1951) (denial of operating permit and construction permit based on misrepresentation of stock holdings and past program content); WREC Broadcasting Service, 19 F.C.C. 1082 (1955) (comparative renewal loss in part for vulgar songs); Mile High Stations, Inc., 28 F.C.C. 795 (1960) (revocation proceeding-warning placed in station file for offensive program content).

14. Trinity, 62 F.2d at 853. The court noted that Reverend Shuler spoke freely of pimps and prostitutes and charged particular judges with sundry immoral acts.

15. Independent Broadcasting Company, 193 F.2d at 902.

16. FCC, Report and Statement of Policy Re: Commission En Banc Programming Inquiry, 44 F.C.C. 2303 (1960).

17. Id. at 2307.

18. Palmetto Broadcasting Co., 33 F.C.C. 483 (1962); In re Reneval of Pacifica, 36 F.C.C. 147 (1964).

19. Palmetto Broadcasting Co. 33 F.C.C. 483 (1961), recon. denied, 34 F.C.C. 101 (1963), aff'd sub nom., Robinson v. FCC, 334 F.2d 534 (D.C. Cir. 1964), cert. denied, 379 U.S. 843 (1964).

20. Palmetto, 33 F.C.C. at 485.

21. Robinson, 334 F.2d at 536. In a concurring opinion, Circuit Judge Wilbur Miller said that the Court had not gone far enough. On examining the broadcast excerpts, judge Miller concluded that they were plain violations of the statute, stating that "[n]o area or population needs a radio program which violates the criminal statute . . ." 334 F.2d at 537 (Miller, J. dissenting).

22. In re Renewal of Pacifica, 36 F.C.C. 147 (1964). The programs included a recorded presentation of Edward Albee's The Zoo Story and a panel discussion about homosexuality. See Video 44, 103 F.C.C.2d 1204 (1986); Kay Smith Enterprises, 98 F.C.C.2d 670 (1984).

23. Reneval of Pacifica, 36 F.C.C. at 154. See also The Jack Straw Memorial Foundation, 21 F.C.C.2d 833 (1970). In the Jack Straw Case, noncommercial station KRAB-FM, Seattle, was issued a short-term renewal of licensee for broadcast of a program which contained allegedly obscene terms. The station's general manager, hearing the tape being played on the station, drove to the studio and took the program off the air. On reconsideration (29 F.C.C.2d 334 (1971)) the Commission offered the station a hearing on the licensing decision. The hearing examiner, after considering the five programming complaints against the station over a three year period, found that while some offensive language was broadcast it was not done with an intent to give offense, sensationalize, shock or break down community standards. After an in-depth review of the station's programming policies and the complained-of programming, the examiner found the station's overall programming to be outstanding and meritorious, granting the full three-year renewal.

24. Eastern Education Radio, 24 F.C.C.2d 408 (1970).

25. Id. at 415. The minimal fine against the licensee was assessed in order to preserve an avenue for judicial review, although the Commission felt they could appropriately forego the forfeiture and simply act prospectively. In fact, because of the new ground it was breaking, the FCC stated that it would welcome judicial review.

26. The Supreme Court's definition of obscenity at that time came primarily from four decisions: Memoirs v. Massachusetts, 383 U.S. 413 (1966) (utterly without redeeming social value); Jacoballi v. Ohio 378 U.S. 184 (1963) (national community standards); Manual Enterprises v. Day, 370 U.S. 478 (1962) (patent offensiveness defined as an affront to current community standards of decency); Roth v. United States, 354 U.S. 476 (1957)(average person, contemporary community standards, dominant theme, prurient interest).

27. The Commission did not discuss what it thought was the relevant community to be used in assessing contemporary community standards.

28. Eastern Education Radio, 24 F.C.C.2d at 411.

29. Id. at 417 (Commissioner Cox, concurring in part and dissenting in part); 24 F.C.C.2d at 422 (Commissioner Johnson, dissenting).

30. Id. at 411. Perhaps it was the Commission's belief in the potential for such acute harm to the radio medium which caused it to become involved in a single incident, rather than reviewing the licensee's entire record at reneval time. Nevertheless, assessment of a fine based on one incident did depart from the approach taken in the Palmetto and Pacifica I cases.

31. Sonderling Broadcasting Corp 41 F.C.C.2d 777, 778 n. 5 (1973) (reconsideration order). In the first two months of 1973, the Commission had received 2,547 complaints--more than the total number of complaints received in 1972. A number of Congressional committees had also criticized the FCC for its lack of performance in enforcing Section 1464. See also In Re Petition by Oliver R. Grace, 22 F.C.C.2d 667 (1970).

32. FCC, Notice of Inquiry into the Alleged Broadcasts and Cablecasts of Obscene, Indecent and Profane Material, 40 F.C.C.2d 105 (1973). Congressional pressure on the FCC to do something about sex and violence in broadcast programming continued in subsequent years. See FCC, Report on the Broadcast of Violent, Indecent and Obscene Material, 51 F.C.C.2d 418 (1975). Reacting to the government concerns, the National Association of Broadcasters amended its TV Code in 1975 to include guidelines concerning scheduling, viewer warnings, and advance notice policies when questionable material was to air. The so-called "family viewing hour" policy was ultimately struck down in court because of the inappropriate influence and threats made by the Commission. See Writers Guild of America v. FCC, 423 F. Supp. 1064 (C.D. Cal. 1976).

33. On the same day the Inquiry was announced, the Board of Directors of the National Association of Broadcasters adopted a resolution condemning "tasteless and vulgar program content, whether explicit or by sexually-oriented innuendo." The day following the announcement of the Inquiry, FCC Chairman Dean Burch addressed the National Association of Broadcasters Annual Convention and urged self-restraint regarding sexual content in broadcasting in order to avoid government intrusion. See, Illinois Citizens Comm. for Broadcasting v. FCC, 515 F.2d 397 (D.C. Cir. 1975).

34. 41 F.C.C.2d 919 (1973) (news release); 41 F.C.C.2d 1130 (1973).

35. Portions of the programming are reproduced in footnote 4 of ICCB, 515 F.2d at 401. For example, a female listener states: ". . . of course I had a few hangups at first about--in regard to this, but you know what we did--I have a craving for peanut butter all that [sic] time so I used to spread this on my husband's privates and after a while, I mean, I didn't even need the peanut butter anymore." According to the hearing examiner's report, other segments concerned aversions to swallowing the semen at climax, overcoming fears as to having the penis bit off, and so forth.

36. Sonderling Broadcasting Corp., 41 F.C.C.2d 777 (1973). In addition, the group asked the FCC to retract and disavow the remarks of Chairman Burch.

37. The Commission had ruled the work obscene based on the Supreme Court's "Roth-Memoirs" test. The court of appeals found the programs obscene based on the more conservative test established in Miller v. California, 413 U.S. 15 (1973) (that obscene material lacks serious literary, artistic, political or scientific value). Interestingly, the court suggested that Sonderling may have had a right to the less demanding definition under Roth-Memoirs had it not waived the right by paying the fine. ICCB v. FCC, 515 F.2d at 405. The court also rejected the claim that the Commission must judge a work "as a whole" as required under the Miller test, holding that the FCC's approach was not inappropriate in evaluating broadcast programs which are episodic in nature where it is commonplace for audience members to listen only to short snatches of a broadcast.

38. 438 U.S. 726 (1978).

39. The words involved were shit, piss, fuck, cunt, cocksucker, motherfucker and tits.

40. Citizen's Complaint Against Pacifica Foundation Station WBAI (FM), 56 F.C.C.2d 94, 99 (1975) (declaratory order), rev'd, 556 F.2d 9 (D.C. Cir. 1977), rev'd, 438 U.S. 726 (1978). The Commission decided to forego the issuance of a Notice of Apparent Liability because the Declaratory Order marked a substantial departure from earlier indecency cases and the decision was used to clarify for all broadcasters the applicable standards for indecency.

41. 413 U.S. 15 (1973).

42. Citizen's Complaint Against Pacifica, 56 F.C.C.2d at 98.

43. Id. The concept of variable indecency was an extension of the variable obscenity theory established in Ginsberg v. New York, 390 U.S. 629 (1968). In Ginsberg, the Court upheld a state statute which prohibited the distribution of sexually explicit material to minors even though the material was not obscene as to adults. The statute was found constitutional since adult access

was not affected and the state had a substantial interest in supporting parents' claim to authority in their own household and in assuring the well-being of children. 390 U.S. at 638-40. The concept of channeling behavior comes from cases involving the regulation of public nuisances. Nuisance law does not seek to ban behavior but to channel it away from inappropriate places. See Williams v. District of Columbia, 419 F.2d 638, 646 (D.C. Cir. 1969) (en banc) (disorderly conduct statute prohibiting profane language, indecent and obscene words in public would be valid under circumstances which create substantial threat of violence or because under contemporary community standards so grossly offensive to members of public who actually overhear it to amount to a nuisance); Von Sleichter v. United States, 472 F.2d 1244 (D.C. Cir. 1972) (shouting "fuck you" probable cause for arrest for disorderly conduct under Williams test).

44. Citizen's Complaint Against Pacifica, 56 F.C.C.2d at 99-100.

45. Id. at 97. The Commission has subsequently dropped the third and fourth rationales. Pacifica Foundation, Inc., 2 F.C.C. Rcd 2698, 2699 (1987) (Pacifica III).

46. Id. at 98.

47. Id. at 100. In separate concurring opinions, Commissioners Reid and Quello stated that they felt the language was inappropriate for broadcast at any time of the day. One year later, in response to a petition by the Radio Television News Directors Association (RTNDA), the Commission released a clarification of its Declaratory Order (Petition for Clarification or Reconsideration of a Citizen's Complaint against Pacifica Foundation, Station WBAI (FM), 59 F.C.C.2d 892, 893 (1976). RTNDA sought assurance that the Commission did not intend to apply its definition of indecent language so as to prohibit the broadcasting of indecent words which might be reported as part of a bona fide news or public affairs program. Responding that it would take no action which would inhibit broadcast journalism and expressing its sensitivity to licensee discretion, the FCC basically restated its position in the Declaratory Order, suggesting that the use of indecent words would be prohibited when children were in the audience except for live coverage of public events where there was no opportunity for journalistic editing.

48. Pacifica Foundation v. FCC, 556 F.2d 9 (D.C. Cir. 1977).

49. Id. at 17. The court ruled that the Declaratory Order was not saved by the attempted Clarification because the words would only be permitted on live news shows or very late at night.

50. Id.

51. Id. at 18.

52. FCC v. Pacifica Foundation, 438 U.S. 726 (1978).

53. Id. at 738.

54. Id. at 740.

55. Id. The Commission in subsequent decisions has continued to apply its definition.

56. Id. at 741. The Court distinguished its holding from Hamling v. United States, 418 U.S. 87 (1974) and U.S. v. 12 200-ft. Reels of Film, 413 U.S. 1223 (1973) where the Court construed the term "indecent" in a related statute (18 U.S.C. 1461 (1982)) to mean "obscene" as defined in Miller v. California. Hamling dealt with a statutory prohibition on the mailing of material which was "obscene, lewd, lascivious, indecent, filthy or vile." The Court refused to place such limits on section 1464 because it dealt with public broadcasts whereas Hamling dealt with the mailing of printed matter enclosed in sealed envelopes mailed from one individual to another. See also Manual Enterprises, Inc. v. Day, 370 U.S. 478 (1962). Some of the words found in the Carlin monologue have been found to be fully protected by the First Amendment in other contexts. See Eaton v. Tulsa, 415 U.S. 697 (1974); Papish v. University of Missouri Curators, 410 U.S. 667 (1973); Brown v. Oklahoma, 408 U.S. 913 (1972); Rosenfeld v. New Jersey, 408 U.S. 901 (1972); Cohen v. California, 403 U.S. 15 (1971).

57. Id. at 743. The Court also notes in dicta that there are few, if any, thoughts that cannot be expressed by the use of less offensive language. Justices Powell and Blackmun, while concurring in the overall holding, rejected the position that the Court is generally free to decide on the basis of content which speech is more or less valuable and more or less deserving of First Amendment protection.

58. Id. at 748-49. See also Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502-503 (1952) (each medium of expression presents special First Amendment problems).

59. Id. at 748, (citing Rowan v. U.S. Post Office Department, 397 U.S. 728 (1970)) (individual receiving offensive material may require that his name be dropped from a mailing list).

60. Id. at 748-49.

61. Id. at 749, (quoting Ginsberg v. New York 390 U.S. 629, 640 (1968)). See supra note 43 and accompanying text.

62. Id. at 750.

63. Id.

64. Id. at 777-80.

65. Id. at 764.

66. Id. at 767.

67. Infinity Broadcasting Corp. of Pa., Pacifica Foundation, Inc., The Regents of the University of Calif., 3 F.C.C. Rcd 930, 931 (1988) (reconsideration order); WGBH Educational Foundation, 69 F.C.C.2d 1250, 1254-55 (1978); Pacifica Foundation (WPFW-FM), 95 F.C.C.2d 7500 (1983).

68. Pacifica Foundation, Inc., 2 F.C.C. Rcd 2698 (1987) (Pacifica III); The Regents of the University of California, 2 F.C.C. Rcd 2703 (1987); Infinity Broadcasting Corp. of Pa., 2 F.C.C. Rcd 2705 (1987).

69. The Commission issued a Public Notice on the day the the decisions were released. FCC Public Notice, New Indecency Enforcement Standards to be Applied to all Broadcast and Amateur Radio Licensees, 2 F.C.C. Rcd 2726 (1987).

70. Pacifica Foundation, Inc., 2 F.C.C. Rcd at 2701; Regents, 2 F.C.C. Rcd at 2704; Infinity, 2 F.C.C. Rcd at 2706.

71. Excerpts of the IMRU program are reproduced in the Commission's decision. They include: "His cock felt warm inside me--and full--so nice and full. So he began sliding his cock back and forth inside of my ass--but so gently, so gently. . . . I want to make you eat ass, suck my balls, and drink my piss like you never have before. You get me?" 2 F.C.C. Rcd at 2700.

72. Pacifica Foundation, Inc., 2 F.C.C. Rcd at 2699.

73. Id. The Commission relies on two Supreme Court cases dealing with zoning ordinances regulating the location of adult movie theatres. See Young v. American Mini-Theatres, Inc., 427 U.S. 50 (1976), reh'g denied, 429 U.S. 873 (1976); Renton v. Playtime Theatres, 475 U.S. 41 (1986). In both cases the Court held that the ordinances were content neutral because the aim of the ordinances was not to control expression but the "secondary effects" of adult theatres, like the quality of urban life. As a content neutral regulation the Commission's indecency scheme would not be subject to a strict scrutiny, least-restrictive alternative analysis, or the stricter standard of review articulated in Consolidated Edison Co. v. Public Service Commission of New York, 447 U.S. 530, 540 (1980) that content-based restrictions be carefully-tailored with "a precisely drawn means of serving a compelling interest."

74. Id.

75. Id. at 2700.

76. Id.

77. Id.

78. Id.

79. Id. at 2699.

80. The Justice Department refused to prosecute.

81. Excerpts are reproduced in the Commission's decision. The lyrics included such lines as "Come here baby and make it quick, Kneel down there and suck my dick." The refrain was "Turn around baby, let me take you from behind, Makin' bacon is on my mind." 2 F.C.C. Rcd at 2703.

82. Regents, 2 F.C.C. Rcd at 2704.

83. Excerpts are reproduced in the Commission's decision. They include: (Stern to caller) "I'd ask you for your penis size but I really don't care. . . .Well don't knock it. I was sodomized by Lambchop, you know that puppet Sherri Lewis holds? . . . You've probably never been with a man with a full erection." 2 F.C.C. Rcd 2706.

84. Infinity, 2 F.C.C. Rcd at 2706.

85. Infinity Broadcasting Corp. of Pa., Pacifica Foundation, Inc., The Regents of the University of Calif., 3 F.C.C. Rcd 930 (1988), 62 RR (P&F) 2d 211 (reconsideration order).

86. Reconsideration Order, 62 RR 2d at 219.

87. Id. at 216. The Commission argued that patent offensiveness can only be construed by reference to specific facts, and must therefore be decided on a case-by-case basis. The Commission also refused to discuss what relevance, if any, a work's merit would have on a determination of patent offensiveness. See also Manual Enterprises v. Day, 370 U.S. 478 (1962) (patent offensiveness defined as an affront to current community standards of decency).

88. Id.

89. 852 F.2d 1332 (D.C. Cir. 1988).

90. Id. at 1334.

91. Id. at 1343 n. 18.

92. Sable Communications of Calif. v. FCC, 57 U.S.L.W. 4920 (U.S. June 23, 1989).

93. Id. at 4924.

94. Id. at 4923-24.

95. Id. at 4923.

96. Id.

97. Id.

98. Id.

99. One attorney involved in the appeal of the 24-hour ban recently said that given the decision in Sable the challenge to defeat the ban would be ". . . like shooting fish in a barrel." See, "And the First Shall be First," Broadcasting, (July 3 1989) :25.

100. Conally v. General Construction Co., 269 U.S. 385, 391 (1926).

101. ACT, 852 F.2d at 1339.

102. This is particularly true in regards to sexual innuendo and double entendre.

103. Bazaar v. Fortune, 476 F.2d 570, 579 (5th Cir.) modified, 489 F.2d 225 (1973). See Niemotko v. Maryland, 340 U.S. 268, 282 (1951) (Frankfurter, J., concurring).

104. Pacifica Foundation, Inc., 2 F.C.C. Rcd at 2699.

105. The appeals court in Pacifica Foundation v. FCC cited a research study which concluded that there are large numbers of children in the television broadcast audience until 1:30 a.m. and that the number of children watching does not fall below one million until 1:00 a.m. 556 F.2d at 13-14.

106. Sable, 57 U.S.L.W. at 4294.

107. This over-arching sweep is the essence of overbreadth. See Grayned v. City of Rockford, 408 U.S.104 (1972).

108. Pacifica II, 438 U.S. at 755 (Powell, J. concurring). Justice Stevens, in the plurality opinion joined by Justices Burger and Rehnquist, rejected application of overbreadth analysis because of the nature of the speech itself: "[w]hile some of these references may be protected, they surely lie at the periphery of First Amendment concern." 438 U.S. at 726. "There are few, if any, thoughts that cannot be expressed by the use of less offensive language." 438 U.S. 743, n. 18. The application of a "less worthy speech" theory has not been limited to commercial speech cases. See Young v. American Mini-Theatres, 427 U.S. 50, 70 (1975) (society's interest in protecting erotic materials is of a wholly different, and lesser magnitude than the interest in untrammeled political debate); FCC v. League of Women Voters of Ca., 468 U.S. 364, n. 13 (1984) (indecent broadcasts

are not core First Amendment speech). See generally Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (limits placed on certain well-defined and narrowly limited classes of speech which are no essential part of any exposition of ideas, and are of slight social value as a step to truth). It is not clear that a majority of the Court has adopted such a view. Justice Powell's concurring opinion in Pacifica II (joined by Justice Blackman) specifically rejected the notion that the Court may decide the limits of First Amendment protection on the basis of the value of certain types of speech. 438 U.S. at 761.

109. ACT, 852 F.2d at 1339-40.

110. For example, the Commission has refused to decide whether the broadcast of James Joyce's Ulysses would violate the indecency standard. In March 1989 radio station KPFA took out a full-page ad in the New York Times complaining about the chilling effects of the FCC's indecency policy. See supra p. 8 & note 8.

111. Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973); Grayned v. City of Rockford, 408 U.S. 104, 114 (1972).

112. Consolidated Edison Co. v. Public Service Commission, 447 U.S. 530, 540 (1980).

113. Pacifica Foundation, Inc., 2 F.C.C. Rcd at 2699.

114. Id.

115. Con. Ed., 447 U.S. at 540.

116. Sable, 57 U.S.L.W. at 4923; Ward v. Rock Against Racism, 57 U.S.L.W. 4920, 4923 (U.S. June 23, 1989); Boos v. Barry, 485 U.S. 312, 329 (1988); Wygant v. Jackson Board of Ed., 476 U.S. 267, 280 n. 6 (1986).

117. Ward, 57 U.S.L.W. at 4884; Pacifica Gas & Electric v. Public Utilities Commission of Ca., 475 U.S. 1, 20 (1986).

118. Ward, 57 U.S.L.W. at 4884.

119. Id. (quoting U.S. v. Albertini, 472 U.S. 667, 698 (1985)).

120. 475 U.S. 41 (1986). See supra note 73 and accompanying text.

121. 427 U.S. 50 (1976).

122. Renton, 475 U.S. at 47; Young, 427 U.S. at 62. In a dissenting opinion in the Young case, Justice Stewart, joined by Justices Marshall and Blackmun, rejected the argument that the regulation was content-neutral (Young, 427 U.S. at 84). In a dissenting opinion in Renton, Justice Brennan, joined by Justice Marshall, rejected the view that content-based restrictions on

speech can be recast as content-neutral if the restriction aims at secondary effects of speech (Renton, 475 U.S. at 55). Justice Brennan said that viewing such restrictions as content-neutral "simply seems to ignore reality." (Renton, 475 U.S. at 56).

123. In a plurality opinion in Boos v. Barry, Justice O'Conner distinguished Renton's secondary effects analysis from content-based regulation, suggesting that if the regulation in Renton was justified by a desire to prevent the psychological damage the city felt was associated with viewing adult-films a content-based analysis would have been appropriate. (485 U.S. at 317.)

124. Ward, 57 U.S.L.W. at 4882, (quoting Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984)).

125. It is possible that the Commission could attempt to justify its indecency policy on the basis of secondary effects such as assisting parents in protection of children, maintaining the quality of community life or maintaining residential privacy. Such an approach reveals the weakness of motivational analysis and it potential for dubious application. See Renton, 475 U.S. at 55-65 (Brennan, J. dissenting).

126. Technical devices, such as lock-out boxes which deny access to certain television channels, offer parents some opportunity to control their children's viewing, even when children are left unsupervised in the home. Future technological applications could increase parents' ability to limit access, both to particular channels and certain time periods.

127. See supra note 43 and accompanying text.

128. 325 U.S. 380, 383 (1957).

129. See e.g., Stanley v. Georgia, 394 U.S. 557 (1969); Rowan v. Post Office Dept., 397 U.S. 728 (1970).

130. Cohen v. California, 403 U.S. 15, 21 (1971). Cohen was convicted of violating a California statute which prohibited maliciously and wilfully disturbing the peace or quiet of any neighborhood or person by . . . offensive conduct. Cohen had walked in a public corridor of the Los Angeles County Courthouse wearing a jacket inscribed with "Fuck the Draft." The Supreme Court reversed the conviction because the offensive expression had occurred in public and because citizens could avoid it easily by averting their eyes.

131. 379 U.S. 728 (1970).

132. Such an unvanted invasion would apparently constituted an intolerable invasion of privacy. But cf. Consolidated Edison Co. v. Public Service Commission, 447 U.S. 530 (1980) (right of public utility to place corporate inserts into bills outweighed privacy interests of customer).

133. Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975) (invalidated ordinance prohibiting nudity on outdoor theatre screens visible from public street); Cohen, 403 U.S. at 21.

134. See Kovacs v. Cooper, 336 U.S. 77, 79 (1949) (upheld restrictions on sound truck); Lehman v. City of Shaker Heights, 418 U.S. 298, 302 (1974) (upheld advertising restrictions on public busses).

135. Lehman, 418 U.S. at 302.

136. Pacifica Foundation v. FCC, 556 F.2d at 17.

137. FCC Legislative Proposals-Track II, 17 September 1981, pp. 18-20 [mimeo].